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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-461

SOPHIE M. GRABOWSKI, individually, as personal representative of the deceased, EDWIN T. GRABOWSKI, and as guardian of the estate of the minor children of EDWIN T. GRABOWSKI,

Petitioner,

v.

NORTHERN FISHING & TRADING COMPANY, INC., a corporation, owners of the fishing vessel NORTH SEA, and ALEUTIAN KING CRAB, INC., a corporation, charterer of the fishing vessel NORTH SEA, who herein petitions for exoneration from or limitation of liability,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND STATEMENT OF INTEREST OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA FOR LEAVE TO INTERVENE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

TO: THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT

The Association of Trial Lawyers of America moves this Honorable Court for leave to file the attached brief in support of the position of the petitioner. Consent has been sought from all parties. Counsel for the petitioner has given his assent. Counsel for the defendants respondents do not assent.

The Association of Trial Lawyers of America is a national bar association whose membership exceeds 25,000 lawyers primarily engaged in the practice of law on behalf of plaintiffs in personal injury litigation. The admiralty section of this association includes most of the attorneys who specialize in the maritime personal injury law on behalf of plaintiffs. These attorneys represent seamen, longshoremen and other maritime workers who are engaged in the hazardous seafaring industry.

This Association, its members, and the injured claimants they represent, are directly affected by the rules relative to the burden of proof and the inferences and presumptions to aid the claimant on that issue, in injury and death claims when the issue is unseaworthiness of the vessel or equipment.

It is essential that those rules be uniform throughout the circuits and therefore, this court should resolve and declare the rules in admirality on the issue of unseaworthiness as they relate to the burden of proof and the use of inferences and presumptions in aid thereof, available to the injured seaman.

Therefore, this Association is vitally concerned with this litigation, not only in the instant case, but also, for the effect the ultimate disposition of this case will have on similar claims now existing and that will arise within the Ninth Circuit and the circuits that have not yet ruled upon the issues.

Because the final resolution of the legal issues in this case will materially affect and thereafter control the outcome of pending and future claims of seamen, it is of substantial importance to maritime workers who are or may

be injured or die, to the maritime industry, and to the admiralty bar, that this court resolve the issues raised in the petition for certiorari.

For all of the foregoing reasons, it is respectfully prayed that this Honorable Court accept this brief of amicus curiae.

The Association of Trial Lawyers of America
By ARTHUR J. MANDELL, Chairman
Amicus Curiae Committee, and
JOSEPH PETER MYERS of Counsel

BRIEF OF AMICUS CURIAE

Introductory Statement

The petitioner herein seeks review of the decision of the Courts below so that she individually and in her representative capacity may obtain compensatory damages for the wrongful death of her husband. This brief in support of the petition for a writ of certiorari is filed because it is imperative that there be a uniform rule stating the burden of proof in admiralty cases involving claims for injury or death based upon unseaworthiness. And it is equally imperative that the law so stated reflects and incorporates the historical compassion of Courts in admiralty for those who risk their lives on the seas.

The petition sets forth an accurate statement of the case, the proceedings below, and relevant facts. In order to create no additional burden, amicus curiae respectfully declines to repeat or re-summarize the facts of the instant case or the nature of the proceedings below.

The petitioner states that the United States Court of Appeals for the Ninth Circuit decided the instant case on the question of burden of proof. Amicus curiae concurs in that

interpretation of the opinion below. Although that Court devoted a substantial portion of its opinion to the question of whether certain findings of fact were clearly erroneous, it is apparent that failure to find "clear error" was dependent upon the Circuit Court's conclusion on the issue of which party had the burden of proof of those facts. And, further, many of the factual findings were irrelevant to the fundamental issue of seaworthiness.

BASIS FOR GRANTING A WRIT OF CERTIORARI

Historically, the Burden of Proof on the Issue of Seaworthiness Was Applied to the Owner of a Vessel in All Cases. The Opinion of the Court Below Is, Therefore, at Variance Not Only With Other Circuits, But Also With Established Principles Announced by This Court

Historically, the right of a seaman to recover damages in an action for injury caused by the unseaworthiness of a vessel or its appliances was granted at a time when the "warranty" of seaworthiness, and the shipowner's duties under it, were absolute. Thus, later cases which have appeared to limit or restrict absolute liability or limit the standards of proof on the part of the shipowner where a loss of cargo is concerned, cannot and should not limit the rights of those making claims for personal injury or death based upon the unseaworthiness of a vessel.

In *The Edwin I. Morrison,* 153 U.S. 199, 38 L. Ed. 688, 14 S.Ct. 823 (1894) the Court dealt with a loss of cargo, and set forth the historical basis for the imposition of a warranty of seaworthiness on the owner of a vessel. The Court cited ancient authorities for the principle that the owner was under an absolute duty to provide a seaworthy vessel. With regard to the burden of proof, on which issue

this Court reversed the District Court, the Court stated (153 U.S. at 215):

> "The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact 'did not depend on their knowledge or ignorance, their care or negligence' the burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden . . . "

In *The Southwark*, 191 U.S. 1, 48 L. Ed. 65, 24 S.Ct. 1 (1903), another cargo case, the Court held that the burden of proof was upon the shipowner to show an exercise of due diligence to provide a seaworthy vessel and rejected the argument that Congress, in seeking to prevent some of the harshness of the rule of absolute liability on the part of the owner by enacting the Harter Act, had also restricted the burden of proof. The Court stated (191 U.S. at 15-16):

> "The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in fit condition to receive and transport the cargo undertaken to be carried; and if, by the failure to adopt such tests and to furnish such proofs, the question of the ship's efficiency is left in doubt, that doubt must be resolved against the shipowner, and in favor of the shipper. In other words, the vessel owner has not sustained the burden cast upon him to establish the fact that he has used due diligence to furnish a seaworthy vessel . . . "

These early cases, and the cases cited therein, clearly demonstrate the nature of the burden of proof on the issue of seaworthiness imposed upon the shipowner. It is important to note that this Court has consistently refused to limit or restrict that burden of proof in the absence of express legislation.

The use of the doctrine of unseaworthiness by injured seamen has a long history. In 1903, in *The Osceola,* 189 U.S. 159, 47 L. Ed. 760, 23 S.Ct. 483 (1902) Mr. Justice Brown stated, after a lengthy review of the English and American cases holding a vessel liable in admiralty for personal injuries received on account of unseaworthiness, the following (189 U.S. at 174):

> "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:
>
> "* * * 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

It is interesting to note that in *The Osceola,* this Court specifically rejected the European Civil Codes which limited the right to base a seaman's claim on the issue of unseaworthiness.

The Osceola was relied upon by this Court in *Carlisle Packing Co. v. Sandanger,* 259 U.S. 255, 66 L. Ed. 927, 42 S.Ct. 475 (1922), and the rule was again stated that the injured seaman had an action in admiralty for injuries received as a result of the unseaworthiness of a vessel or its equipment. And, even more important to the issues in the instant case, Justice Brown carefully distinguished between the nature of actions for injury founded upon negligence and actions founded upon the unseaworthiness of a vessel or its equipment. It is the contention of amicus curiae that the failure to carefully separate the nature of such actions at the trial level may well have led to the erroneous

conclusions regarding the burden of proof on the issue of seaworthiness made by the Ninth Circuit in the instant case. Merely because the typical suit filed by an injured seaman or his personal representative is founded on three causes of action—essentially the historical ones for maintenance and cure, negligence (Jones Act), and unseaworthiness—should not mean that the burden of proof is to be lumped together on all issues. The tendency of the Ninth Circuit, and even the commentators relied upon by it, to state that the burden of proof in cases of negligence *and* unseaworthiness is on the claimant, is to ignore the very different origins and development of the two theories of liability. In *Mitchell v. Trawler Racer,* 362 U.S. 539, 4 L. Ed. 2d 941, 80 S.Ct. 926 (1960) the majority opinion announced by Mr. Justice Stewart, 362 U.S. at 546-548, set forth the historical differences between these theories, and the separate opinion of Justices Frankfurter, Harlan and Whittaker, 362 U.S. at 556-568 does so as well. Regardless of the result, it is clear that that decision recognizes that different rules and burdens apply in actions founded on the separate theoretical bases.

In *Seas Shipping Company, Inc. v. Sieracki,* 328 U.S. 85, 90 L. Ed. 1099, 66 S.Ct. 872 (1946) this Court again recognized the liability of an owner for indemnification of a seaman for an injury caused by the unseaworthiness of a vessel, and stated the public policy in favor of the absolute liability of a shipowner for such injury in language clearly prophetic of the emergence of doctrines of strict liability being applied to civil actions generally, including the policy of allocation and distribution to insurers and commerce generally of the social costs of injury to seamen.

In *Commercial Molasses Corp. v. N.Y. Tank Barge*

Corp., 314 U.S. 104, 86 L. Ed. 89, 62 S.Ct. 156 (1941) this Court set forth distinct rules regarding the burden of proof to be applied in cases involving cargo loss, the distinction being made between common carriers and private carriers. That distinction was based on a recognition that the common carrier agrees, by its status, to be not only a bailee but an insurer of cargo which it carries, while a private carrier is free to regulate mutual rights and responsibilities with shippers of goods by contract.

The *Commercial Molasses* case did not deal with the question of seaworthiness or the burden of proof in cases involving personal injury or death of a seaman. It should be obvious, and it is clearly the thrust of those cases applying the doctrine of unseaworthiness to claims for personal injury or death, that the consensual nature of the agreement between a shipowner and shipper of goods is not the true foundation for claims for injury or death. The policy of the cases is clearly that the obligations of providing a seaworthy vessel, and proving it to be so, are placed upon the shipowner because of the enormous imbalance in relative position of the parties and the inability of the seaman to protect himself by examining the vessel for unseaworthiness or effectively providing some means, such as insurance, for spreading his personal risk of loss. *Seas Shipping Co. v. Sieracki, supra,* 328 U.S. at 95.

And, it would be absurd indeed to assume that a claim for personal injury or death of a seaman based upon the unseaworthiness of a vessel should have a different result depending upon the status of the vessel as that of a contract carrier or a private carrier. The commercial enterprise which chooses to bear added risk and insure itself therefor by choosing a private carrier to ship its cargo rath-

er than a common carrier is simply not equivalent to the seaman selecting a vessel upon which he may find employment.

It is the position of amicus curiae that the effective limitation of liability in *Commercial Molasses*, by the creation of distinct rules on the burden of proof in actions against private carriers based upon the unseaworthiness of a vessel, is totally inappropriate to claims for personal injury or death, and inconsistent with the recognition of the seaworthiness doctrine as an appropriate one upon which to base claims for injury or death.

Petitioner indicates (petition for writ of certiorari, pages 9-10) that the facts of the instant case are sufficient to sustain any burden of proof which might be placed on her by an application of the private carrier doctrine set forth in *Commercial Molasses*. It is the position of amicus curiae that, regardless of the application in the instant case of inferences and presumptions arising from the specific facts of the loss of the *North Sea* which would protect petitioner, this Court should not adopt a standard so inconsistent with the history of the protection afforded all injured seamen by the unseaworthiness doctrine. If, however, such a change in the law is to be created, this Court should grant certiorari in this case in order to provide uniformity and understanding of that uniformity in the law.

THERE IS A CONFLICT AMONG THE CIRCUITS ON THE BURDEN OF PROOF AND THE NATURE OF PRESUMPTIONS APPLICABLE TO THE ISSUE OF UNSEAWORTHINESS

A. Ninth Circuit

In a series of decisions, the United States Court of Appeals for the Ninth Circuit has placed the burden of proof

of unseaworthiness on the injured seaman or the personal representatives or heirs of deceased seamen.

The Court below, in applying the burden of proof of unseaworthiness to Mrs. Grabowski, cited *Walston v. Lambertsen*, 349 F.2d 660 (9th Cir. 1965) *cert. denied*, 382 U.S. 980, 86 S.Ct. 553, 15 L. Ed. 2d 470 (1966).

The *Walston* case involved a careful review of conclusions of law of the Trial Court. Those conclusions stated that there was no evidence to establish negligence and, further, there was no evidence to establish unseaworthiness of the vessel at or prior to the time of loss. Because no evidence of unseaworthiness in one or more particulars existed at or prior to the time of the loss, the Court then concluded there could be no presumption of unseaworthiness. The Court specifically found, after review of the entire record, that there was substantial evidence to affirmatively support conclusions of absence of negligence and absence of unseaworthiness in the vessel.

Lieberman v. Matson Navigation Company, 300 F.2d 661 (9th Cir. 1962) involved an action brought by a seaman injured aboard a ship which occurred when he slipped on a cardroom deck which was covered with soapy water. One count was brought under the Jones Act for negligence and the second count under the general maritime law alleged unseaworthiness. The Court stated that "whether unseaworthiness or negligence are a proximate cause of the accident are questions of fact. *Borgen v. Richfield Oil Corp.*, (9th Cir. 1958), 257 F.2d 505. The burden of proving either is on appellant. [citing cases]". The Court also noted, however, that it could not determine from the findings of fact whether the Trial Court had believed the plaintiff's

story and had not found negligence or unseaworthiness, or simply had disbelieved the plaintiff.

In *Ramos v. Matson Navigation Co.*, 316 F.2d 128 (9th Cir. 1963) the Court dealt with an action for damages based on unseaworthiness and for negligence under the Jones Act. In that case the Trial Court made a finding that the vessel was seaworthy and also findings that were related to the issue of negligence. In that case, the Trial Court made a finding that at all relevant times the vessel on which the claimant was injured was seaworthy. It is obvious in the *Ramos* case that the Court based its real determination on the clear impression that the Trial Court did not believe any portion of the claimant's testimony, either as to how the accident occurred or as to the nature or extent of the injuries suffered. In the action, the claimant had charged that the vessel was unseaworthy and that the stowage of laundry was unsafe and that he was not, therefore, provided with a safe area to work. He also made charges of negligence under the Jones Act and for maintenance and cure.

The *Walston v. Lambertsen* case includes the statements as to burden of proof attributed by the Court below in the instant case. However, it is to be noted that there were specific conclusions of law which appear to be, in reality, findings of fact. The Court found no evidence to establish unseaworthiness of the vessel at or prior to the time of the loss and sinking and further concluded that there was to be no presumption of unseaworthiness of the vessel because there was no evidence indicating either negligence or unseaworthiness in one or more particulars at or prior to the time of the loss. In *Walston*, there was no proof of the actual cause of the sinking of the vessel. There was no indica-

tion that the vessel sank because it could not withstand weather (the weather was calm). The ship was relatively new, not a wood vessel constructed more than twenty years years prior to the sinking. The Court stated (at 662):

> "The Court below obviously and properly believed that there could be no foundation for inference absent satisfactory proof of an unseaworthy condition which might reasonably be expected to relate directly to the sinking of the vessel."

Regardless of the statements in *Walston* as to the burden of proof, it is clear that there was substantial affirmative evidence introduced by the shipowners as to the complete history of the planning and construction of the vessel, that the vessel had withstood heavy seas on numerous occasions, and this affirmative evidence certainly supported the finding that the vessel was, in fact, seaworthy. This is in marked contrast to the instant case, where there was a notable lack of such affirmative evidence, *or* of a finding that the *North Sea* was seaworthy.

One can reconcile *Walston* with *Commercial Molasses* only by disregarding the language used by the Ninth Circuit and noting that, in each case, the shipowner *met* its burden of demonstrating seaworthiness of the vessel. The Court in *Commercial Molasses* recognized that an inference drawn from the sinking shifted the burden to the owner. The Ninth Circuit announced a very different inference, but, in reality, applied the same standard.

It is possible to interpret the opinion of the Court below in the instant case as stating the proposition that the burden of proof on the issue of unseaworthiness may be different in proceedings brought under the statutes for exoneration as against claims made directly in admiralty for

personal injury or death. That implication, which may be drawn from the opinion at 477 F.2d 1271 in footnote 1 should be rejected. Whatever this Court declares the burden of proof should be in claims for personal injury or death arising out of unseaworthiness, that burden should be the same in exoneration cases or in cases brought directly by claimants in admiralty. Obviously, a rule more favorable to claimants in exoneration cases would effectively circumvent the purpose of the limitation of liability statute; and, on the other hand, a rule which provided an advantage to the shipowner on the requisite burden of proof in an exoneration case would be grossly unfair to claimants in such proceedings, the forum for which was selected by the shipowners themselves.

B. Third Circuit

In *Eastern Gas & Fuel Associates v. Martin Marine Trans. Co.*, 190 F.2d 394 (3rd Cir. 1951) a claim for the loss of a cargo of coal was filed by the shipper, based upon the alleged unseaworthiness of a coal barge and the negligence of the owner. The trial court made findings in favor of the owner that the sinking of the barge was caused by peril of the sea constituting an excepted risk under the charter. The Court stated that no affirmative showing to offset the presumption of unseaworthiness had been made in the case. The Court stated at page 397:

> "It is sufficient that libellant was entitled to prevail on the basis of the inference of unseaworthiness which should have been drawn from the unexplained sinking in weather the vessel should have been able to withstand."

and reversed that portion of the judgment dealing with the unseaworthiness of the coal brage.

A similar presumption of unseaworthiness was applied by the 3rd Circuit in *R. D. Wood Company v. Phoenix Steel Corp.*, 327 F.2d 921, 923 (1964).

C. Fifth Circuit

In *Vega v. The Malula*, 291 F.2d 415 (5th Cir. 1961) the Court clearly indicated that a prima facie case of unseaworthiness had been created by the failure of a marine appliance being used for its normal expected purpose, and that there would be "an unremitting liability" on the part of the owner based on breach of the warranty of seaworthiness.

In *Gibbs v. Kiesel*, 382 F.2d 917, 919 (5th Cir. 1967) the Court held that doors which fell and injured a seaman during their ordinary intended use were defective and that, therefore, the vessel was unseaworthy as a matter of law.

Amicus curiae contends that the reliance of petitioner on the case of *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964) is amply justified. In that case, which relied upon *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L. Ed. 2d 941 (1960) the Court clearly stated that seaworthiness is defined as "reasonable fitness to perform or do the work at hand." And that, therefore, once there is a showing that a vessel, or a part of a vessel, has failed under circumstances in which it is expected to operate, unseaworthiness had been established regardless of the care or prudence of the owner.

D. *The 84-H*

It should be noted that in the opinion of the Court below (477 F.2d at 1271-2) there is a discussion of and reliance upon the case of *The 84-H*, 296 F. 427 (2nd Cir. 1923)

cert. den. subnom., Randolph v. Bouker Contr. Co., 264 U.S. 596 (1924). It is abundantly clear from a reading of *The 84-H* that that case deals only with a claim founded on negligence and does not deal with a claim brought on a theory of unseaworthiness. Accordingly, although it has been used by several courts as authority for the proposition that the burden of proof is on the claimant to prove negligence *or* unseaworthiness, it is clearly authority only for the former proposition. And it is abundantly clear that the liability for negligence, alone, is a very different creature of the law from the liability founded on unseaworthiness.

CONCLUSION

Amicus curiae respectfully urges that this Court grant the petition for a writ of certiorari filed herein. It is essential that the protection of seamen in admiralty be maintained and that the action based upon the unseaworthiness of a vessel or equipment not be restricted or diluted by the imposition of a burden of proof which is not, historically, the seaman's to bear—and that the rule announced by the Ninth Circuit be rejected.

Respectfully submitted,

ARTHUR J. MANDELL, Chairman
Amicus Curiae Committee
JOSEPH PETER MYERS of Counsel
Amicus Curiae